

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS JOSEPH MELGER,

Plaintiff,

v.

SACRAMENTO SHERIFF  
DEPARTMENT,

Defendants.

No. 2:21-cv-1611 AC P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. Three Strikes Analysis

Plaintiff seeks leave to proceed in forma pauperis under 28 U.S.C. § 1915(a). ECF No. 2. The Prison Litigation Reform Act of 1995 (PLRA) permits any court of the United States to authorize the commencement and prosecution of any suit without prepayment of fees by a person who submits an affidavit indicating that the person is unable to pay such fees. However,

[i]n no event shall a prisoner bring a civil action or appeal a judgement in a civil action or proceeding under this section if the prisoner has, on 3 or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). The plain language of the statute makes clear that a prisoner is precluded from bringing a civil action or an appeal in forma pauperis if the prisoner has brought three frivolous actions and/or appeals (or any combination thereof totaling three). Rodriguez v. Cook, 169 F.3d 1176, 1178 (9th Cir. 1999). “[Section] 1915(g) should be used to deny a prisoner’s [in forma pauperis] status only when, after careful evaluation of the order dismissing an action, and other relevant information, the district court determines that the action was dismissed because it was frivolous, malicious or failed to state a claim.” Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005).

Inspection of other cases filed by plaintiff in this court has led to the identification of at least three cases brought by plaintiff that qualify as strikes. The court takes judicial notice of the following lawsuits filed by plaintiff:<sup>1</sup>

1. Melger v. Wesp, E.D. Cal. No. 2:16-cv-1103 KJN (case dismissed as barred by Heck v. Humphrey, 512 U.S. 477 (1994), on July 19, 2016);<sup>2</sup>
2. Melger v. Obama, E.D. Cal. No. 2:16-cv-1527 AC (case dismissed on March 31, 2017, for failure to state a claim);
3. Melger v. Becerra, E.D. Cal. No. 2:18-cv-3264 WBS CKD (case dismissed on June 17, 2019, for failure to state a claim).

All of the preceding cases were dismissed well in advance of the September 3, 2021<sup>3</sup>

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<sup>1</sup> The court “may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.” United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (citation and internal quotation marks omitted) (collecting cases); Fed. R. Evid. 201(b)(2) (court may take judicial notice of facts that are capable of accurate determination by sources whose accuracy cannot reasonably be questioned).

<sup>2</sup> The Heck bar was clear on the face of the complaint because plaintiff indicated that his conviction had not been overturned or invalidated. Dismissal therefore counts as a strike. Washington v. Los Angeles Cty. Sheriff’s Dep’t, 833 F.3d 1048, 1055-57 (9th Cir. 2016) (dismissal under Heck counts as a strike where the bar is clear on the face of the complaint and all claims are dismissed for a qualifying reason under the PLRA).

<sup>3</sup> Since plaintiff is a prisoner proceeding pro se, he is afforded the benefit of the prison mailbox rule. Houston v. Lack, 487 U.S. 266, 276 (1988) (establishing rule that a prisoner’s court document is deemed filed on the date the prisoner delivered the document to prison officials for mailing).

1 filing of the instant action and none of the strikes have been overturned. Therefore, this court  
 2 finds that plaintiff is precluded from proceeding in forma pauperis unless he is “under imminent  
 3 danger of serious physical injury.” 28 U.S.C. § 1915(g). To satisfy the exception, plaintiff must  
 4 have alleged facts that demonstrate that he was “under imminent danger of serious physical  
 5 injury” at the time of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir.  
 6 2007) (“[I]t is the circumstances at the time of the filing of the complaint that matters for  
 7 purposes of the ‘imminent danger’ exception to § 1915(g).”); see also, Abdul-Akbar v. McKelvie,  
 8 239 F.3d 307, 312-14 (3rd Cir. 2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir.  
 9 1999); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998); Banos v. O’Guin, 144 F.3d 883,  
 10 885 (5th Cir. 1998).

11 The complaint alleges that plaintiff was fired from his job because his employer found  
 12 information about his criminal history on the Sacramento County Sheriff’s jail website, which  
 13 constituted an improper disclosure and violated his privacy and due process rights. ECF No. 1 at  
 14 3-4. These allegations do not demonstrate an imminent risk of serious physical injury at the time  
 15 of filing, and the undersigned will therefore recommend that plaintiff be required to pay the filing  
 16 fee in full or have the complaint dismissed.

## 17 II. Plain Language Summary of this Order for a Pro Se Litigant

18 You have at least three strikes under § 1915(g) and cannot be granted in forma pauperis  
 19 status unless you show the court that you were in imminent danger of serious physical injury at  
 20 the time you filed the complaint. You have not shown that you were in imminent danger of  
 21 serious physical injury and so it is being recommended that your motion to proceed in forma  
 22 pauperis be denied and you be required to pay the whole filing fee at one time.

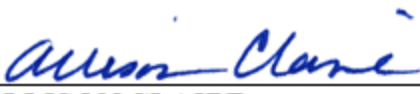
23 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court shall randomly  
 24 assign a United States District Judge to this action.

25 IT IS FURTHER RECOMMENDED that plaintiff’s motion to proceed in forma pauperis  
 26 (ECF No. 2) be denied and plaintiff be ordered to pay the entire \$402.00 in required fees within  
 27 thirty days or face dismissal of the case.

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1           These findings and recommendations are submitted to the United States District Judge  
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
3 after being served with these findings and recommendations, plaintiff may file written objections  
4 with the court. Such a document should be captioned “Objections to Magistrate Judge’s Findings  
5 and Recommendations.” Plaintiff is advised that failure to file objections within the specified  
6 time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153  
7 (9th Cir. 1991).

8 DATED: September 16, 2021.

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11 ALLISON CLAIRE  
12 UNITED STATES MAGISTRATE JUDGE  
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